

The meanings of words

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This will be one of the longer articles I've ever written for this column, but hang in there, it's worth it. The case, *Duboise v Brantley*, No. S14G1192 (Sup. Ct. Ga.; July 13, 2015), revolved around what an expert witness's qualifications needed to be, particularly regarding his experience with the procedure performed. The facts are simple. The plaintiff had an umbilical hernia. The surgeon performed a laparoscopic repair. Unfortunately, the plaintiff's pancreas was punctured during the procedure upon inserting the primary trocar. As a result, he developed pancreatitis, respiratory failure, acute renal failure, and sepsis; he spent several days in a coma and was in intensive care for a month. Although he ultimately survived, he needed several additional surgeries to repair the damage. The defendant admitted that yes, he perforated the pancreas, but this was a potential known side effect of the procedure, and that doing so was not a breach of the standard of care, since this injury is a known complication of performing the procedure laparoscopically, one that the patient was made aware of.

The plaintiff's expert witness, Dr Swartz, opined that although he often performs various laparoscopic procedures, he no longer uses the technique to repair umbilical hernias because he prefers an open approach. He testified that in the last 5 years he performed only 1 laparoscopic umbilical hernia repair. Furthermore, he testified that unless the pancreas was in an unusual anatomic location, which wasn't the case, the pancreas should not be punctured by insertion of a trocar when performing any abdominal laparoscopic procedure and since the defendant did so, it was a breach of the standard of care.

The defendant's attorney objected to Dr Swartz's testimony, arguing that the plaintiff's expert was not competent to render an expert opinion since he had performed only 1 such procedure in the last 5 years. The trial court allowed the testimony. On appeal, the appellate court reversed. This appeal to the Georgia supreme court ensued.

The supreme court started its analysis by noting the following axioms regarding statutory construction and interpretation, in this case, Rule 702(c)(2)(A).

1. Any statute draws its meaning from the text as it is written.
2. The reviewing court must presume that the legislature that drafted the statute in question "meant what it said and said what it meant."
3. The statute must be read "in its most natural and reasonable way, as an ordinary speaker of the English language would."
4. Whereas the common and customary use of words is important, the context in which they are used is just as important.
5. "For context, we may look to the other provisions of the same statute, the structure and history of the whole statute, and the other law—constitutional, statutory, and common law alike—that forms the legal background of the statutory provision in question."

The statute in question governs the admissibility of expert testimony by expert witnesses in civil cases, and section 702 (b) reads as follows.

If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify thereto in the form of an opinion or otherwise, if:

- (1) The testimony is based upon sufficient facts or data;
- (2) The testimony is the product of reliable principles and methods; and
- (3) The witness has applied the principles and methods reliably to the facts of the case which have been or will be admitted into evidence before the trier of fact.

In addition, Rule 702(c)(2)(A) and (B) requires that the expert:

Have actual professional knowledge and experience in the area of practice or specialty in which the opinion is to be given as the result having been regularly engaged in:

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- (A) The active practice of such area of specialty of his or her profession for at least three of the last five years, with sufficient frequency to establish an appropriate level of knowledge, as determined by the judge, in performing the procedure, diagnosing the condition, or rendering the treatment which is alleged to have been performed or rendered negligently by the defendant whose conduct is at issue; or
- (B) The teaching of his or her profession for at least three of the last five years as an employed member of the faculty of an educational institution accredited in the teaching of such profession, with sufficient frequency to establish an appropriate level of knowledge, as determined by the judge, in teaching others how to perform the procedure, diagnose the condition, or render the treatment which is alleged to have been performed or rendered negligently by the defendant whose conduct is at issue.

The defendant argued that Rule 702 and all subsections stood for the proposition that the expert must actually have performed or taught the procedure in question during 3 of the last 5 years. He also argued that the procedure in question is a laparoscopic repair of an umbilical hernia. As Dr Swartz's own testimony shows, since he does not perform this procedure, his testimony should be precluded. The court then conducted a lucid session in legal reasoning. First, it noted that the statute does not define the word *procedure*. Referring to the dictionary, the court took judicial notice of the plain meaning of the word: "procedure refers to a process, method, or series of steps undertaken for the accomplishment of an end." The problem thus became the level of generality at which the procedure in question is to be defined. The court put it this way.

Suppose that someone pointed out a dog and asked: "What sort of animal is that?" Animals can be classified at varying levels of generality, and so, you might accurately respond that the animal is a vertebrate, a mammal, of the order Carnivora, of the family Canidae, of the genus *Canis*, of the species *Canis lupus*, or of the subspecies *Canis lupus familiaris*. . . . More specific yet, you might identify the dog by its breed, gender, or some other distinguishing, immutable characteristic. Every one of these answers would amount to an accurate response to the question.

In the same way, a medical "procedure" can be identified at varying levels of generality. Take the procedure at issue in this case. It could be accurately characterized . . . as a "laparoscopic procedure to repair an umbilical hernia." Characterized in that way, the record is clear that Dr. Swartz has performed no more than one such procedure in the past five years. The

procedure could, however, be characterized more generally—but just as accurately—as the surgical repair of an umbilical hernia or as an abdominal laparoscopic procedure. Under either of those characterizations, Dr. Swartz would have actual experience performing the procedure in question, inasmuch as he regularly performs surgical procedures to repair umbilical hernias, and he regularly performs abdominal laparoscopic procedures of various sorts.

Because not all laparoscopic procedures to repair umbilical hernias are done in exactly the same way, the procedure also could be characterized more specifically than—but just as accurately as—the way in which the Court of Appeals, Dr. Brantley, and Southeast Georgia Health characterized it. Indeed, the medical literature indicates that laparoscopic surgeons use a variety of techniques to enter into the abdominal cavity, they use different points of entry to access the abdominal cavity, and they use different numbers of trocars, as well as trocars of different sorts and sizes, to do so. . . . With respect to laparoscopic procedures to repair umbilical hernias specifically, the literature likewise indicates variations in techniques and tools. . . . And the record in this case confirms the variability of techniques and tools used in the laparoscopic repair of umbilical hernias.

The defendant argued that "procedure" should be interpreted at an "intermediate" level of generality without stating a foundation for why. The supreme court was not persuaded and flatly told the defendant that he was wrong. Turning to the next issue, the court noted that an expert, as per the statute, must have "actual and professional knowledge and experience in the area of practice or specialty in which the opinion is to be given"; that his knowledge and experience is derived from the fact that the expert was "regularly engaged in the active practice of such area of specialty for three of the last five years or in teaching. . . as an employed member of the faculty of an educational institution. . ."; and that the expert has done so with "sufficient frequency to establish an appropriate level of knowledge, as determined by the judge, in performing the procedure or teaching others how to perform the procedure."

The court noted that, ideally, an expert can demonstrate his appropriate level of knowledge by proving that he has actually done the procedure in question; without such "proof," he could indeed be found lacking. However, according to the statute that is not really the issue, the real question is whether the expert has the "appropriate level of knowledge in performing the procedure or teaching others how to perform the procedure, not whether the expert himself has actually performed or taught it." But if the statute calls for an expert to have this level of knowledge and that it is suitable or fitting

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